

February 16, 2007

US Department of Labor
Employment Standards Administration
Wage and Hour Division

To Secretary Chao-

We are writing in response to the Department of Labor's request for comments on its Family and Medical Leave Act of 1993 (FMLA) regulations.

The FMLA became law in 1993 with long-standing support from both parties in Congress. The Act was a direct response to the entrance of millions of working women into the workplace and the resulting changes for families and employers. Over 50 million families have benefited from the FMLA, which has allowed them to be both responsible workers and family members. We strongly support the Act, and seek to expand its protections to make it even more effective for both workers and employers.

Today, families and employers are even more dependent on keeping multiple earner families in the workplace. In our global economy, employers need efficient, productive, and well trained workers. Families often need two salaries to afford rising housing, food, transportation and health care costs. Families and employers also have a strong interest in nurturing today's children so that they can become the workforce of tomorrow.

By every measure, the FMLA has been a resounding success. In considering any modifications to its regulations, the Department should not underestimate this tremendous progress. Nor should it undermine the protections of the law.

A continuing concern for Congress has been the lack of recent data, since the 2000 Westat survey, collected on numbers of employees taking FMLA leave and types of leave taken. Some of the questions posed in this request are difficult to answer without additional data. We urge the Department to collect additional data as well as the anecdotal information that will be collected from this request for information.

We are particularly concerned because in recent years the Department of Labor has made clear its intent to weaken the FMLA. Moreover, this request for information focuses heavily on alleged problems raised by employers, but does little to address the concerns of workers.

The Department's RFI relates isolated employer anecdotes of FMLA issues and seeks evidence of such problems. While individual stories are worth examining,

they are not sufficient to warrant changes to the regulations. Rather, the Department should have any revisions on objective data and evidence of the law's operation. The Department should establish an objective threshold for evaluating problems in the law and evidence of its operations. For example, in 2000, the Department contracted for a comprehensive survey to collect data on the FMLA to the extent the Department believes updated data is necessary the Department should conduct a new survey rather than seek subjective employer data. And before any substantial regulatory changes are undertaken, the Department should consider convening a balanced working group of nationally recognized experts on the FMLA equally representing employers and workers and enable the parties themselves to reach mutually agreed upon compromises on FMLA interpretation.

With respect to specific issues raised in the Department's request for information we submit the following comments:

- 1) The *Ragsdale* decision: As the Department notes, the Supreme Court did not invalidate the Department's regulations, it invalidated penalties in the regulation that exceed the requirements of the FMLA. To the extent the Department feels it must respond to the *Ragsdale* decision, the Department should modify its regulations to limit any penalty to the four corners of the law and go no further.
- 2) Definition of serious health condition: A key purpose of the FMLA was to give workers sufficient time to recover from serious illnesses or to care for family members who face grave medical conditions. These are often unforeseeable events that can devastate a family, and a resulting loss of employment would be doubly devastating. Accordingly, the Senate Committee, whose view was adopted in conference, specified that "[t]he definition of 'serious medical condition' . . . is broad and intended to cover various types of physical and mental conditions." Senate Rep. No. 103-3 (Jan. 27, 1993). The Senate Committee also explained that "the general test" for a serious medical condition is simply that "either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery," including "either inpatient care or continuing treatment or supervision by a health care provider." Id. Further, the FMLA is a remedial statute that should be read broadly to include those it was meant to protect.

The Department's RFI raises concerns about the definition of serious health condition. We strongly believe that the Department should take both an expansive and flexible view toward this definition. Given the strong evidence that Congress intended the provision to be read very broadly and to capture a wide range of

medical conditions. Indeed, there is no evidence that Congress intended the definition to be restricted in any way beyond the general test provided. The Department must adhere to that test. Ultimately, Congress and the Department are not physicians and we cannot evaluate every medical condition or necessary course of treatment. We must trust the medical community to understand what conditions and treatment warrant significant time off from work—the presence of a serious illness is something that is readily determined by medical professionals. In addition, FMLA leave is unpaid, and so it is unlikely that workers would take extensive or even short term leaves unless they urgently needed to, since most families cannot afford to absorb the loss of a paycheck. They therefore take leave only when absolutely necessary. The purpose of the Act is to enable workers and families to treat these illnesses and return to work; we therefore believe that any change in this area should make this benefit more available to families, not less.

3) Adequate notice to employees and employers: The Department mentions a few of the notice issues that have arisen under the FMLA. It is true that the statute is not perfect in elaborating the notice obligations of employees and employers under the FMLA. It would be helpful for the Department to ask Congress to clarify how the notice motions of the Act apply. It is not clear that the Department can fully resolve the issues regulatory. The law or the regulations should put forth a clear and common sense regime by which employers would notify workers of their rights under the Act, workers would be required to notify their employers of their need to take FMLA leave, and employers would be required to notify workers of their approval or denial of FMLA leave and the term of any approval or reasons for any denial and appeal rights. Clearer notice requirements would also resolve any issues as to the “duration” of leave.

4) Intermittent leave: As the Department notes, there have been few if any complaints regarding scheduled intermittent leaves. The Department states that some employers have complained about employees taking “unscheduled” intermittent leave such as half days off for doctor visits or to take medication, etc. The ability of employees to take intermittent leave due to or for treatment of a serious medical condition as needed is a critical protection of the FMLA and is part of what makes the Act so valuable for those with serious illnesses. We believe both employers and employee representatives see the value of the leave provisions in the law as it stands. Any erosion to this protection is both unwarranted and unneeded. As the Senate explained, an employee recovering from such a condition may “require continuing medical supervision or treatment of that condition for which he must periodically be absent from work,” including, for instance, “4 hours leave for a medical treatment.” Senate Rep. No. 103-3. Further, Congress intended employees to be able to take intermittent leave for

“unforeseen events,” such as “sudden changes in a patient’s condition that require a change in scheduled treatment.”

No one can schedule their illnesses or visits to the emergency room, or an unexpected change in medical condition. Given that specific intent of Congress to provide for the use of unscheduled intermittent leave, the Department should preserve that vital employee right.

5) Medical certification and HIPAA privacy protections: It is not clear why the Department raises this issue and we do not believe there are issues in the interaction of the FMLA and HIPAA that the Departments needs to address.

6) Paid leave substitution: We believe that an employee’s right to substitute paid annual or sick leave for FMLA leave is essential to their ability to maintain pay while taking the leave that they need.

7) Waiver of rights: we strongly believe that employees should retain their right to settle current and past claims related to FMLA. We suggest that the Department work with stakeholders to best address the needs to resolve complaints and protect employees’ rights under the FMLA.

In conclusion, the Family and Medical Leave Act, has been successful in allowing employees to be productive at work and care for their needs at home and has been a minimal burden to most employers. We feel that the Departments collection of data on all of the issues raised in the Request for Information is essential before issuing proposed regulations on any aspect of the law and its implementation. The lack of recent data has been a concern which we hope will be addressed through this process. We look forward to working with the Department, employees, employers and all stakeholders to ensure that the protections of the FMLA are upheld.

Respectfully submitted,